IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION; POLOKWANE

CASE NO: A19/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
DATE: 08 MAY 2023

In the matter between:

TINYIKO ROBERT MOKOENA: **APPELLANT**

and

THE STATE: **RESPONDENT**

JUDGMENT

Delivery: The judgment shall be handed down electronically by email to the parties' legal representatives. The date of hand down shall be deemed to be the **08 MAY 2023 at 14:00.**

SEMENYA AJP:

[1] The appellant was convicted in the Regional Court sitting at Nkowankowa, on two counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007. He was sentence to fifteen (15) years imprisonment in respect of each count. The appeal, which is with leave of the trial court, is directed at the conviction and the resultant sentence.

[2] It is not in dispute that the appellant and the complainant engaged in an act of sexual penetration on the date of the incident. It is the number of times that she was penetrated and the absence of consent that is disputed. The appellant avers that he penetrated the complainant once and the latter said twice, hence the two counts of rape.

[3] The complainant testified that on the evening of the **22 December 2012** at about **18:00**, the appellant, who was unknown to her at that stage, found her talking over her cellphone in the street next to a shop she had accompanied her cousin T[....] M[....] (T[....]) to. The appellant approached her, grabbed, took her phone and dragged her to an abandoned house with long grass outside. As far as she knew, the house was once occupied by a mentally ill person whom she had not seen in a while. She tried to scream for help along the way to the house, but the appellant told her that he will produce an object and will injure her therewith.

[4] Upon arrival at that abandoned house, the appellant forcefully undressed her of her pair of pants and panties up to her knee level and ordered her to lie down. She complied with the order. He undressed and climbed on top of her and engaged her in acts of sexual penetration without her consent. He stopped after he had ejaculated inside her. As she was in the process of pulling her pants up, he again grabbed her by her head and neck and forced her to bend down. He penetrated her again, this time, from behind. He gave her his cap to wipe her private parts with. She did. She was crying throughout her ordeal even though no one could hear because of the loud music which was playing in the background.

[5] After the forceful acts of sexual penetration, and while still crying, she went back to the shop where she found T[….] waiting for her. She reported the incident to T[....] . She told her that she does not know the name of the person who raped her

but that she will be able to identify him. The appellant came to the shop as she was still reporting. She then pointed him to T[....] . T[....] told her that his name is Robert Mapangula, the appellant in this matter. They went home and later went to the police station where the incident was reported. The police took her to Letaba hospital for examination.

[6] The version of T[....] M[....] is almost similar, if not identical to that of the complainant. She stated that she is the one who asked the complainant to accompany her to the shop to buy panado tablets. She also confirmed that the complainant's cellphone rang and she left the shop to answer it. She waited for the complainant outside because she did not want to go back home without her for fear of rebuke by complainant's mother. The complainant returned to her at a later stage, distraught and crying. She reported that she has been raped by a man who was unknown to her, but that she would be able to identify him whenever she can see him again. The appellant arrived shortly thereafter and the complainant pointed at him as the one who raped her. She informed the complainant that his name is Robert.

[7] Sister Homu, a forensic nurse stationed at Letaba hospital, examined the complainant a day after the date of the incident. She testified that the only injury she could observe on the complainant's genitalia was a bruise on the fossa navicularis, which, according to her is consistent with sexual assault. She further stated that the complainant was already sexually active as at the date of the incident. She collected samples from the genitals for DNA analysis.

[8] It is stated in an affidavit deposed to by Captain Mampedi Phineas Masetla which was handed in as exhibit in terms of section 212(4) of the Criminal Procedure Act[1] that:

> *"the DNA results from the panty S[....] J[....]matches the DNA results from the reference sample Mokoena Tinyiko Robert"*

[1] 51 of 1977

The correctness of the manner in which the DNA samples were collected from the complainant and the appellant, the packaging and handling of the samples before their dispatch to the Forensic Science Laboratory (FSL), their dispatch to the FSL, the testing thereof at the FSL, and, lastly the test results, were not placed in dispute by the appellant.

[9] The appellant testified in his defence and admitted that he did engage in an act of sexual penetration with the complainant but that it was only one penetration. It is his version that he and the complainant have been in a love relationship since February of that year. It is further his testimony that the complainant called him at about **14:00** on the date of the incident when he was still at work. They arranged that he will come to her when he knocks off. He indeed proceeded to the shop after he knocked off. The complainant and T[....] arrived and found him in the company of Nicky Zola, Happy Rikhotso (Happy) and others. He gave T[....] R100.00 so that she can buy liquor for herself. They sat inside the tavern within the same premises and consumed liquor. At some stage the complainant stood up and went towards the gate. She called him on his cellphone and he went to her.

[10] Upon his arrival at the place where the complainant was, she told him that she wants to be alone with him. Knowing that they could not go to his house because his wife was at home, he approached Happy and asked him to allow him to go to his aunt's RDP house nearby. Happy agreed. Together with the complainant, they proceeded to Happy's aunt's house. They entered inside but because the contents of the house were in disarray, he decided that they should go and sit outside. They spent some time outside busy talking, kissing and touching each other. They thereafter engaged in consensual act of sexual penetration. Contrary to what the complainant said, he stated that the said act of sexual penetration took place inside the house and not in the long grasses under the tree. He further denied that he penetrated her twice.

[11] It is the appellant's version that on their way back to the tavern, the complainant told him that she bought a pair of shoes on lay-buy basis and that he must give her R500.00 to pay for them. He told her that he had used all the money he had to buy liquor and that he will only have money on the 25th. The complainant said her sister

was correct in telling her that he, the appellant, would not be in a position to take care of her as he was married. It is his belief that the complainant laid criminal charges against him because of his inability to give her money and also that T[....] saw them together when they were returning from Happy's aunt's house together. He suspects that the complainant was scared that T[....] will report this to her family.

[12] Happy Rikhotso stated that he became aware of the relationship between the appellant and the complainant prior to the date of the incident. He confirmed that he was also seated with them at the tavern. He also stated that he saw the complainant making a call to the appellant and the appellant following the complainant to the gate. He further confirmed that he allowed the appellant to go to his aunt's house.

[13] The attack on the judgement of the trial court is largely directed at its factual findings, in particular, its evaluation of the probabilities and improbabilities of the evidence presented before it. Marais JA said the following with regard to the manner in which the appeal court should approach the trial court's factual findings:

> *"…*
> *there are well established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reason why this deference is shown by appellate Courts to factual findings of the trial court are so well-known that restatement is unnecessary"*[2].

[14] The appellant contends that the trial court misdirected itself in accepting the complainant's version that no one saw the appellant dragging her to the RDP house and that she could not scream in the process. It is further contended that the trial court ought to have had regard to the contradictory version of the complainant and T[....] with regard to the level of the noise caused by the music which was coming from the tavern. The appellant submitted that if the complainant cried as she has testified, those around the tavern could have heard her.

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[2] S v Hadebe and Others 1997 (2) SACR 641 at 645e-f

[15] The argument proffered on behalf of the appellant lose sight of the complainant's version that when she was about to scream, the appellant threatened that he will injure her with an object. I find that no adverse inference could be drawn from her failure to alert other people about her plight because of the threats. The trial court correctly accepted her version in that regard. The complainant's version that she cried is corroborated by that of T[....] who testified that she was crying when she returned.

[16] The appellant contends that the trial court erred in failing to accept that the complainant lied about the existence of a love relationship between her and the appellant. It was submitted that this argument is supported by the admission she made to the forensic nurse that she was raped by a known person. According to the appellant, this admission lends support to the version that he and the complainant have been in a romantic relationship prior to the date of the incident. I find this argument to be without merit. T[....] had already told the complainant what the appellant's name was at the time she consulted with the nurse. 'Known' may also mean that she knew him by sight. He was therefore known to her at the time of the gynaecological examination.

[17] The sentiments made in **S v Sauls and Others**[3] in relation to the correct approach to the evidence of a single witness finds application in the present case. In its evaluation of the credibility of the complainant, what the trial court was required to do was to consider the merits and demerits of her evidence and to satisfy itself that the truth has been told. It appears from the record of the proceedings that the trial court did exactly that.

[18] The appellant's criticism of the trial court's rejection of Happy's version on the basis that he has a reason to support his long time friend has merit. It is further correct that if this finding is anything to go by, same should apply to T[....] 's version because she is the complainant's cousin. However, this is not the only reason why

[3] 1981 (3) SA 172 (A) at 180

the trial court convicted the appellant. If anything, it shows that the trial court considered a conspectus of the evidence presented before it[4].

[19] Although Marais JA in S v Hadebe and others (above) has deemed it unnecessary to restate the reason for the Appeal Court's deference to the trail court's factual findings, it is important to note that such reasons were said to be the following in **R v Dlhumayo and Another**[5]

> "*The appellate court must steer its way between the Scylla of interfering too readily with the judgment on facts of a judicial officer who has had the opportunity of seeing and hearing the witness, an opportunity which it itself unfortunately has not had, and the Charybdis of not interfering when, making due allowance for those advantages, it is satisfied that the evidence taken as a whole cannot support its conclusion."*

[20] In amplification of his defence of consent, the appellant stated during cross-examination that this was not their first sexual encounter. This fact, together with others, was not put to the complainant in order to give her the opportunity to admit or refute it. The appellant did not tell the court about anything that he may have given the complainant during the past sexual encounters. This is material as it would have supported his version that the case was reported solely because he did not give the complainant the money. "*The purpose of cross-examination is to elicit facts favourable to the cross-examiner's case and to challenge the truth and accuracy of the witness' version of the disputed events."*[6] The complainant was denied the opportunity to deny the allegations of previous sexual encounters.

[21] I fail to find any misdirection in the trial court's credibility findings that warrant interference by this court. The conviction is found to be in order. The totality of the evidence proved that the act of sexual penetration on both occasions were without the complainant's consent. The complainant was able to show that the appellant stopped to rape her on the first occasion and that she was in the process of wearing

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[4] S v Trainor 2003 (1) SACR 35 (SCA)
[5] 1948 (2) 677 (A) at 699
[6] Principle of evidence Schwikkard and van Der Merwe, third addition at 366

her pants when he ordered her to turn so that he can penetrate her again. The two acts of penetration are clearly distinguishable.

[22] On sentence, the trial court was alive to the provisions of section 51 (2) of the Criminal Law Amendment Act[7] which prescribes a minimum sentence of 10 year' imprisonment for any person convicted of rape circumstances similar to the one in the present case. In **S v Bogaards**[8] it was stated that the appeal court can only interfere with the sentence imposed by the trial court where there has been an irregularity that has resulted in a miscarriage of justice.

[23] At the commencement of the trial, the learned Regional Magistrate explained the provisions of section 51(2) of the Criminal Law Amendment Act to the appellant. The appellant was informed that, should he be convicted of the offences he was charged with, he will, in the absence of substantial and compelling circumstances, be sentenced to imprisonment for a period of not less than ten years in respect of each count, if found to be a first offender. The proviso to section 51 (2) authorises a Regional Magistrate to impose a sentence that exceeds the prescribed minimum sentence by a period of five years. This proviso was not brought to the attention of the appellant at any stage during trial.

[24] The appellant contends that the trial court misdirected itself by imposing a sentence of fifteen (15) years' imprisonment in respect of each count without inviting the parties to address it before it could do so. In this respect, an analogy could be drawn between the circumstances of this case and what the Constitutional Court has said in Bogaard, above. The Constitutional Court ruled in that case that it is irregular for the appeal court to increase a sentence without first giving an accused person a notice of its intention to do so in the interest of fairness. Similarly, counsel for the appellant is correct in his submission that the trial court misdirected itself in going beyond the minimum sentence prescribed by the legislature, without first giving him a notice of its intention to do so.

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[7] 51 0f 1997
[8] 2013 (1) SACR 1 (CC) at par 41

[25] The trial court rejected, in line with **S v Vilakazi**[9] the submissions that the personal circumstances of the appellant amounts to substantial and compelling circumstances. It further rejected the submission that the appellant was remorseful about what he has done. The trial court had the opportunity to observe the appellant from the commencement of the trial to its conclusion. It was in a better position to form an opinion as to whether the appellant is indeed remorseful or is simply regretful -see **S v Matjitji**[10] The appeal court is not in a better position than the trial court in this regard.

[26] The sentence imposed on the appellant goes against settled sentencing principles, and, on that basis, justifies this court's interference. This applies specifically in respect the five years imposed in terms of the proviso to section 51(2). It is that part of the sentence that has to be set aside.

[27] In the result the following order is made:

i. The appeal against conviction on both counts is dismissed;
ii. The conviction is confirmed;
iii. The appeal against sentence succeed;

The sentence imposed by the trial court is replaced by the following:

Count 1: ten (10) years imprisonment;
Count 2: ten (10) years' imprisonment;

M V Semenya
ACTING JUDGE PRESIDENT OF THE HIGH COURT; LIMPOPO DIVISION.

I agree

M Naudè-Odendaal J

[9] 2009(1) SACR 552 (SCA)
[10] 2011 (1) SACR 40 SCA.

JUDGE THE HIGH COURT; LIMPOPO DIVISION; POLOKWANE

Appearances:

Attorneys for the Appellant:	**Legal Aid SA.**
Counsel for the Appellant:	**Adv. Mnzini**
Attorney for the Respondent:	**DPP; Limpopo Division**
Counsel for the Respondent:	**Adv. Magoda P**
Judgment reserved on:	**24 March 2023**
Judgment delivered on:	**08 May 2023**